

Exhibit E

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE
OFFICE OF THE GENERAL COUNSEL
PROCUREMENT LAW CONTROL GROUP
WASHINGTON, DC 20548

In the matter of:

Helicopter Transport Services LLC

B-400295.2

SUPPLEMENTAL MEMORANDUM OF LAW

With this memorandum, the U.S. Department of Agriculture, Forest Service (Agency) responds to the supplemental protest grounds filed August 4, 2008 (Supp. Protest), by protester Helicopter Transport Services LLC (HTS) (attached, without exhibits, as Exhibit A). In particular, this memorandum will address concerns raised in an email (attached as Exhibit B) and during a telephone call by the Government Accountability Office (GAO) subsequent to the filing of the supplemental protest, which are summarized as follows:

1. By evaluating the "aircraft technical capability" factor on an acceptable/unacceptable basis, did the Agency neutralize what the RFP called its most important factor? GAO's concern is that "all the offerors who proceeded in the competition got the same score, thus negating, rather than recognizing and appreciating, any differences." See Exhibit B.
2. Did the Agency conduct a meaningful, deliberate weighing of the costs and benefits of awarding line items to higher-priced, higher-technically-rated aircraft over the lower-priced aircraft proposed by HTS?
3. How does the Agency defend the performance, in light of the technical evaluation team's (TET's) summary comments (Exhibit B), and the lack of contemporaneous documentation? How does the Agency respond to HTS's allegation that it considered HTS's performance in only one of the three required years?

This memorandum provides detailed responses to each of these questions and demonstrates the reasonableness of the Agency's procurement decisions. In particular, with respect to number (1), above, the Agency believes GAO so far has been simply unaware of what

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the Agency considered relevant to "aircraft technical capability." Completely irrelevant to that factor is whether any helicopter exceeded the Agency's performance specifications, since the Agency needed only to determine whether those the specification could be met, as based on current and complete documentation. The acceptable/unacceptable evaluation lent itself to that determination, whereas the qualitative assessment HTS now wants would not have done so.

FACTS RELEVANT TO SUPPLEMENTAL PROTEST

In the Technical Proposal Instructions, Solicitation No. AG-024B-S-08-9003 (the RFP) informed offerors that "[t]he technical proposal will be used to make an evaluation and arrive at a determination as to whether the proposal will meet the requirements of the Government." AR, Tab 7, at 212 (emphasis added). In addition, offerors were told that "[a]ward [would] be made to

offerors whose proposals were technically acceptable and whose technical/price

the information provided, the aircraft could lift 5,000 pounds at an altitude of 8,000 feet and 25 degrees Celsius. If it could not, then the aircraft was deemed "unacceptable" for that line item and it was not considered further in the evaluation process. An aircraft also could be deemed unacceptable under factor 1 if the offeror failed to provide all of the materials listed in Section E of the RFP for factor 1: *i.e.*, an Interagency Helicopter Load calculation (based on weights determined within a specified timeframe), copies of certain certificates, current weight and balance, a current equipment list, and performance data. AR, Tab 7, at 212-213. That is because, among other reasons, current, complete information was necessary for the Agency to determine price per pound (PPP) under its best value formula. Exhibit C, at ¶ 6. The submission of incomplete or old information under factor 1 would improperly skew the results of the Agency's best value analysis. Therefore, proposals that contained incomplete or old information, or that failed to demonstrate the offered aircraft could not perform as required, did not move forward in the competition. This occurred with respect to one of the 11 helicopters HTS offered. Exhibit C, at ¶ 7.

On the other hand, if the offeror submitted all of the information required under Section E, and showed that at least one of its aircraft could perform to the specifications of the line item(s) for which it was offered, then the offeror was deemed "acceptable" under factor 1 and received a score of 2 for that factor.

Under this evaluation method, an offeror that failed to offer any acceptable helicopters (either for lack of proper documentation or because they could not perform to specifications) was not further evaluated by the TET for technical factors 2 through 4, or for price. That offeror was removed from the competition. Likewise, if, hypothetically, one of several helicopters an offeror proposed was unacceptable, the offeror would proceed in the competition with a score of 2 on

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factor 1, but the unacceptable helicopter would not. This explains what GAO has raised as an apparent inconsistency in the Agency Report, which stated, "[p]roposals were submitted by 34 offerors for a total of 88 helicopters," (AR, Tab 2, at ¶ 5) but that "evaluations included 32 vendors offering a total of 80 helicopters." AR, Tab 5, at 1. The decrease in number of offerors and helicopters represents those offerors and helicopters that were deemed unacceptable under factor 1 and were not evaluated under factors 2 through 4, or for price.

Although the evaluation scoresheet indicates that an "unacceptable" rating on factor 1 would result in a score of 5, in practice, an unacceptable aircraft was disqualified entirely, without receiving a score. (Indeed, it would be nonsensical to apply any score to an aircraft that

already was determined not to meet the Agency's requirements for that line item.) However, offerors that had at least one technically acceptable aircraft did receive a 2 for factor 1, and that score was incorporated into the offeror's total adjectival score. This outcome was consistent with the RFP notification that "[a]ward [would] be made to those offerors whose proposals [were] technically acceptable and whose technical/price relationships [were] the most advantageous to the Government." AR, Tab 7, at 216.

Past Performance Evaluation and Tradeoff Analysis

Further explanation of the Agency's past performance evaluation and tradeoff analysis is provided in statements submitted herewith from the CO (Exhibit C) and the TET Chair (Exhibit D). In response to HTS's claim that the Agency only considered one of three past performance years, the TET describes his own personal experience with HTS, which dates back to 2005. Exhibit D, at ¶ 5. He also states that ten of the TET members had personal experience dealing with HTS, which was discussed as part of the past performance evaluation. Only one evaluator

had no such experience. *Id.* at ¶ 4. The TET Chair also specifically addresses GAO's concern

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regarding the apparent contradiction inherent in the award of some line items to HTS despite the Agency's dissatisfaction with HTS's performance. He states,

The first ten (10) items in the contract called for a payload of 5,000 pounds. The only aircraft that are capable of this are the S-64, CH-54, and BV-234." Exhibit D, at ¶ 17. In other

choice but to award co.

The CO statement echoes this

reasoning: "[I]f for a particular line item we . .

chose it. W/

was not a deal breaker in this procurement." Exhibit C, at ¶ 13. (Nor should it have been, because past performance was the second least important technical evaluation factor.)

The CO also provides further explanation of the cost/technical tradeoff analysis performed by the Agency, after receiving the Optimization Model's (OM's) recommendations for award. "The evaluation team . . . reviewed the OM recommendations to ensure the Government was obtaining the best combination of aircraft, not necessarily the aircraft that was recommend by the OM." Exhibit C, at ¶ 2. So, although the OM functioned as a sort of computerized tradeoff analysis, the Agency did not mechanically adopt its recommendations. They "studied each recommendation provided by the OM model and looked at the overall scoring, gallons delivered, price per pound index and the overall price for each recommendation. For each line item, the team either concurred with the OM recommendations or made a recommendation to award to a different vendor. We did change a couple of the OM recommended items." Exhibit C, at ¶ 3.

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ARGUMENT

- A. The Agency's Evaluation of Aircraft Technical Acceptability on an Acceptable/Unacceptable Basis Was Reasonable and Consistent With the RFP.

HTS argues the Agency's decision to evaluate factor 1 on an acceptable/unacceptable

"meaningfully consider the different features and capabilities of competing aircraft and whether any of those characteristics presented advantages to the government" (Supp. Protest, at 11), thereby negating the importance of factor 1; and (b) the acceptable/unacceptable evaluation was "irrational," because it did not provide "a meaningful basis for determining whether any of [the differences between aircraft] amounted to an advantage that might inure to the government's benefit." Supp. Protest, at 12.

As this part of the Argument will explain, the Agency was not required to qualitatively assess aircraft under factor 1. Contrary to numerous misleading statements by HTS on this point¹, nowhere did the RFP promise such an assessment, nor did it imply that factor 1 would be

that would have been reflected in its PPP, which is where the evaluation process took into account how well a helicopter performed. Simply put, the Agency did not care, with respect to "aircraft technical capability," whether one helicopter outperformed another, as long as each could perform to the specifications.

1. *The RFP Did Not Promise Offerors a Qualitative Evaluation of Factor 1.*

According to HTS, evaluating factor 1 on an acceptable/unacceptable basis was inconsistent with the RFP, which "contemplated a best value procurement, based upon the qualitative assessment of price and four technical factors." Supp. Protest, at 2. This statement misleadingly implies the RFP promised a qualitative assessment of every technical evaluation factor, including factor 1, which it did not. HTS also argues the Agency was required to qualitatively evaluate factor 1, based on *Lithos Restoration, Ltd.*, B-247003.2, 1992 U.S. Comp. Gen. LEXIS 501 (Apr. 22, 1992), which is distinguishable from this protest.

HTS cites *Lithos Restoration, Ltd.* for the principle that the most important evaluation factor must be evaluated qualitatively, and not on a pass/fail basis. It is true that in that case

clearly would not be evaluated that way (because they had not been singled out for such treatment). So, the agency in *Lithos Restoration, Ltd.* should have done a qualitative assessment of key personnel once a proposal made it through the pass/fail evaluation. Here, because the Agency did not expressly state that some factors would be go/no-go, while others would not, there is no basis for assuming the list of technical factors was intended to be qualitatively assessed.

Nothing in the RFP creates such an assumption, particularly as to factor 1. To the

~~extent, the RFP asks offerors only to demonstrate the capability of each helicopter to perform~~

as each line item required. Consider, for example, the following:

- a. Section B of the RFP, Supplies or Services and Prices, defined each of the three tiers of the procurement (items 1 through 10, items 11 through 18, and items 19 through 34) in terms of their "capability." AR, Tab 7, at 102. Whether an aircraft was eligible for award under a particular tier depended on whether it met the minimum performance requirements specified in Section B. In keeping with that requirement, the "Aircraft Technical Capability" factor considered only whether an aircraft met -- as opposed to exceeded -- the minimum performance requirements.
- b. The information HTS believes should have been part of the factor 1 analysis -- *i.e.*, that its particular make and model of helicopter could carry more than other makes and models -- was expressly made part of a different evaluation factor; namely, price. The RFP states, under Business Proposal Instructions, "The best value formula will be used to make trade-off determinations to measure aircraft efficiencies of make and models of helicopters offered." AR, Tab 7, at 211 (emphasis added).
- c. In contrast, the Technical Proposal Instructions request only enough information to determine "whether the proposal will meet the requirements of the Government." AR, Tab 7, at 212 (emphasis added).
- d. As to factor 1 specifically, the RFP instructions state, "[p]erformance enhancing data . . . shall not be used and will not be considered for the evaluation of proposals." AR, Tab 7, at 213.
- e. Offerors were informed that awards would be made to "those offerors whose proposals are technically acceptable and whose technical/price relationships are the most advantageous to the Government." AR, Tab 7, at 216 (emphasis added).

2. *HTS Was Not Prejudiced By the Agency's Alleged Failure to Notify Offerors of the Acceptable/Unacceptable Factor 1 Assessment.*

GAO "will not sustain a protest absent a reasonable showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award." *OfficeMax, Inc.*, B-299340.2, 2007 WL 2255096, *7 (Comp. Gen. 2007). In this case, even if the RFP expressly referred to factor 1 as a pass/fail factor, HTS would have had no greater chance of receiving awards for the four protested line items. HTS would not have done anything differently, had the Agency's evaluation method been made more clear.

HTS alleges it suffered competitive prejudice from the Agency's evaluation of factor 1 on a pass/fail basis, claiming it would have had a reasonable chance of being awarded the

¹. See Supp. Protest, at 25.

HTS's method of determining prejudice, however, is misguided. In considering the prejudice issue, GAO may not, in effect, substitute a different procurement method that incorporates a qualitative assessment, if such a system would not address the Agency's needs; i.e., determining whether a helicopter could meet (not exceed) its requirements. GAO "will not disturb an agency's determination of the procurement method to be used in accommodating its minimum needs unless it is shown clearly to be unreasonable." *Cornell University*, B-196915, 1980 WL 17281, *1 (Comp. Gen. 1980). So, the question GAO should ask itself is, "what could HTS have done differently if it knew factor 1 was pass/fail, and not a qualitative assessment?" The answer is "nothing."

², so no prejudice was suffered,

and no remedy is necessary.

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requirement for this helicopter, wouldn't it have done so? HTS knew the Agency would evaluate offers without discussions and that its "initial offer should contain [its] best terms from a cost and technical standpoint" (AR, Tab 7, at 210) and still.

TS cannot now ask GAO for the chance to try harder with respect to its having been sufficiently warned that it must put its best foot forward initially. See *OfficeMax, Inc.*, *supra*, at *8 (protester suffered no prejudice from lack of clear notice that its failure to comply with mandatory solicitation requirements would result in disqualification, because protester could not have complied with the requirement anyway).

B. The Agency's Cost/Technical Tradeoff Analysis Was Sufficient and Adequately Documented.

HTS alleges that the Agency based its source selection on a "purely mechanical" application of numerical scores (Supp. Protest, at 17), a claim that has now twice been refuted by the CO in his initial and supplemental statements of relevant facts.⁴ GAO has indicated that additional contemporaneous documentation is needed to support these statements. See Exhibit B. But, while it is true that GAO accords "greater weight to contemporaneous evaluation and source selection documents," GAO also must "consider the entire record, including statements and arguments made in response to a protest, in determining whether an agency's evaluation and selection decision are supportable." *Motorola, Inc.*, B-254489, B-254489.2, 1993 WL 530673,

³ HTS was informed of this fact during its debriefing.

⁴ See AR, Tab 2, at ¶¶ 14-15 ("The team reviewed each item being recommended [by the OM] by looking at the overall score and the best value formula and the make and model of the aircraft. . . . I reviewed the TET recommendations to determine, for each line item, whether the recommended aircraft was the best value to the government at the offered price, given how it was rated in the technical evaluation"); see also Exhibit C, at ¶ 3 ("The evaluation team then reviewed the OM recommendations to ensure the Government was obtaining the best combination of aircraft, not necessarily the aircraft that was recommended by the OM. This process was subjective and allowed for adjustments to the OM recommendations").

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at *4 (Comp. Gen. 1993). Therefore, GAO must credit the CO's assertion that he and the TET performed a subjective, non-mechanical best value analysis after obtaining the OM recommendations, particularly where HTS has not challenged the statements' veracity.⁵

~~the Report does contain contemporaneous source selection~~

documents that show the CO and the TET performed a meaningful tradeoff analysis. The CO's pre-protest "Request for Source Selection Authority" to Ron Hooper provides, for each line item, two or three sentences explaining why the Agency in some cases recommended a higher-priced aircraft; e.g.,

" AR, Tab 5,

at 3 (line item 7).⁶ In cases like this one, where the RFP informed offerors that technical factors were significantly more important than price, GAO has accepted even less documentation than

at its debriefing: "[S]ince Motorola's cost was lower by only approximately 18 percent and since GTE had a technically superior proposal, there was no need to conduct a formal trade-off involving percentages etc., since there was a Superior proposal with relatively little cost difference and the RFP stated that technical was more important than all other factors."

Motorola's protest at #7. GAO denied the protest, finding the agency's

.R, Tab 5, at

3-4.⁸

Finally, HTS attempts to fit its proposal into the category by referring to its supposed ability to

Supp. Protest, at 17. But

In this procurement,

whether a proposal was technically superior depended on the ratings it received on the four technical factors: aircraft technical capability, safety/risk management, past performance, and operational experience. Technical superiority did not depend -- as HTS would have GAO

believe -- on the degree to which one helicopter could outperform another. For that reason, even if, for sake of argument, this fact was not even a consideration for factor 1, so.

with a score. (AR, Tab 5, at 15), as compared with their scores of 2 and respectively. See AR, Tab 5, at 13-14.

GAO has similarly found reasonable the government's decision to pay the awardee a price "125 percent higher" than the protester's price, stating its conclusion was not changed by the "great" cost difference. "Implicit in the contracting officer's cost/technical tradeoff is the determination that [the awardee's] outstanding approach is worth the difference in price." *General Services Engineering, Inc.*, B-245458, 1992 WL 15031, at *8 (Comp. Gen. 1992). In that case, as in the instant protest, the technical factor was more important than price. *Id.* at *1.

⁸ Even if, in the face of these cases, GAO finds the Agency did not adequately document its tradeoff analysis, that deficiency cannot be found to have caused any prejudice to HTS unless GAO also determines that the awards to Erickson and Columbia were unreasonable.

C. The Technical Evaluation Team Appropriately Based Its Past Performance Evaluation on the Limited Documentation Provided By HTS and On Evaluators' Personal Knowledge

1. *HTS Failed In Its Duty to Provide Any Documentation That Would*

(2005-2007)." AR, Tab 7, at 213. HTS complains that the Agency failed to consider its performance in 2005 and 2006, stating, "there is an absence in the record of documentation regarding the services that HTS performed during the 2005 and 2006 fire seasons." Exhibit A, at 70. The Agency's most immediate response to this complaint is that, if the Agency lacked

information relating to the 2005 and 2006 fire seasons, it is because HTS did not provide any. With the Forest Service, HTS had only one contract in each of the years 2005 and 2006, which explains why the Agency had limited discussions about HTS's performance during those years. Exhibit D, at ¶ 5. (HTS did not have multiple contracts with the Forest Service until 2007. Exhibit D, at ¶ 11.) If HTS had relevant contracts with parties other than the Agency in 2005

2006 that would have bolstered its past performance, it should have provided them.

- See AR, Tab 8, at 267-275.

HTS failed entirely to provide any references in support of its past performance (even for 2007), but it now argues the Agency's past performance evaluation was deficient, because the Agency did not consider information from two of three prior years -- information HTS did not supply. It was HTS's responsibility -- not the Agency's -- to supply references from each of the three years that would attest to HTS's past performance. "An agency's evaluation is

2. *The Agency's Evaluation of HTS's Past Performance Was Properly Based on TET Members' Personal Experiences with HTS and Supported by Performance Reviews.*

The Agency did, in fact, consider HTS's performance, thanks to TET members' extensive dealings with HTS in the preceding contract year. Although HTS failed to provide any references or contact information, most members of the TET (in addition to the CO) had worked for years with HTS. See Taylor Declaration, Exhibit D, at ¶ 4. It is well established that "[a]n evaluator's personal knowledge of an offeror may be properly considered in a past performance evaluation." *Omega World Travel, Inc.*, B-271262.2, 1996 U.S. Comp. Gen. LEXIS 378, at *7

(Comp. Gen. 1996); *see also Daylight Tree Service & Equipment, LLC*, B-310808, 2008 U.S. Comp. Gen. LEXIS 12 (Comp. Gen. 2008) (denying protest, where evaluation team provided documentation from prior contracts with protester to support their personal knowledge). In this case, the TET members verbally discussed their experiences with HTS and determined that, based on those experiences, HTS deserved

Although the TET did not document these discussions, which GAO cites as a concern, other documents in the Agency Report, such as performance reviews by the agency and letters to HTS from past years, provide evidence that supports the TET'. In *Omega World Travel*, a case with facts that are remarkably similar to those in this protest, GAO denied a protest that was based in part on a complaint that the agency's past performance evaluation was inadequately supported with contemporaneous documentation. As HTS does now, the protester pointed to a few positive comments included in customer surveys (one reference rated the protester "good") that appeared to contradict the agency's overall negative past performance evaluation, and it objected to the evaluators' reliance on their personal experiences with the protester, which was the incumbent contractor. To support its evaluation, the agency provided negative customer surveys, internal memoranda, and post-protest declarations that explained the evaluators' rating, but no contemporaneous documentation to explain the rating. GAO found this was sufficient, stating, "while we accord more weight to contemporaneous documents in determining whether an evaluation was reasonable, our review is based on all the information in the record, including documentation prepared in response to the protest contentions." *Omega World Travel*, at *9.

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3. *That HTS Was Awarded Some Line Items And Received Some Positive Reviews Does Not Undermine the Reasonableness of Rating.*

HTS has pulled and quoted from the Agency Report some of the positive comments that were included among the _____ of its past performance. See Supp. Protest, at 21 (quoting reviewed who "enjoyed working along with" HTS employees). It also argues that HTS must have been underrated in past performance, given the TET summary comment calling HTS "o _____ " *Id.* at 22. GAO, too, refers to this comment as "fairly positive," and points to another comment in which the evaluator stated he or she would again work with HTS. See Exhibit B. GAO has asked the Agency to defend the _____ past performance rating in light of these arguments.

That some positive comments existed, and that HTS ultimately was awarded some line items, do not contradict _____ rating. The contracts HTS received are, if anything, evidence that the past performance factor was treated as only the second least important technical evaluation factor, as the RFP informed offerors it would be treated. Had past performance been the most important factor, then HTS may have received no awards at all. But because it was the third most important factor, the effect of _____ rating was not so severe.

The Agency's evaluation of HTS's past performance is not unreasonable merely because

_____ exist to contradict the negative.

_____ rating reflects the TET's

balancing of positive against negative. In particular, the TET balanced positive experiences with

" Exhibit

D, at ¶ 11.

This was reasonable, given that the


pilots and mechanics have been forced to do as HTS management instructs. Exhibit D, at ¶ 17.

... as its members' positive experiences

with HTS pilots and mechanics,

"Regarding the relative merits of offerors' past performance information, this matter is generally within the broad discretion of the contracting agency, and our Office will not substitute our judgment for that of the agency. . . . A protester's mere disagreement with the agency's judgment does not establish that an evaluation was improper." *AT&T Corp.*, B-299542.3, B-299542.4, 2007 U.S. Comp. Gen. LEXIS 250, at *40 (Nov. 16, 2007).

Submitted this 22nd day of August, 2008.


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